NO. 83-5596

IN THE

Supreme Court of the United States

October Term, 1983

JOSEPH ROBERT SPAZIANO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF OF RESPONDENT ON THE MERITS

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CITATION TO OPINIONS BELOW

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JURISDICTIONAL STATEMENT

The petitioner's statement is accepted.

STATEMENT OF THE CASE

The Respondent generally accepts the Petitioner's statement, adding only the following:

The record is silent as to where Mr. Spaziano was from August of 1973 until February 9, 1974, when he became a defendant in Orange County, Florida. (J.A. 32) The Petitioner was eventually implicated in this case by Anthony Dilisio, a witness in the Orange County case. (J.A. 32)

At the end of Petitioner's trial, defense counsel informed the court that the statute of limitations had run as to all lesser degrees of murder. (R 729) Defense counsel stated that a waiver of the limitations defense was being considered.(R 730) After a recess, however, the Petitioner invoked the defense,(R 753) and insisted that the jury not be instructed regarding any lesser offense, saying:

I understand what I'm waiving

> I was brought here on first degree murder, and I figure if I'm guilty of this I should be killed. (R 754)

Petitioner did not appeal the failure to give lesser offense instructions, but did file, as "supplemental authority" the case of Beck v. Alabama, 447 U.S. 625 (1980). (J.A. 22) The Supreme Court of Florida distinguished Beck as inapplicable to this case. (J.A. 22)

SUMMARY OF ARGUMENT

It is submitted that Mr. Spaziano has failed to present any claim sufficient to warrant relief.

The Respondent suggests that Florida law, which places the defense of limitations in the hands of defendants (for their discretionary use) and its related requirement that, in circumstances where the defense is available, it be waived in order to obtain the benefit of jury instructions on otherwise unprovable lesser offenses, does not offend the constitution.

The Respondent further submits that the State has the absolute authority to designate its fact finder and adjudicator in capital cases. Florida opposes the creation of any ad hoc rule that the "adjudicator" is determined by the outcome.

Finally, there is no legal or factual basis to the claim that Florida's jury override procedure is incapable of being

utilized because it creates an unattainable standard of review, to wit: "facts suggesting death so clear and convincing that no reasonable man could differ," on the theory that the threshhold disparity between the judge's and jury's opinions reflect disagreement between reasonable men. If this was the intent of the Supreme Court of Florida when coining the phrase, it would have abolished jury overrides. Nor does this standard preclude review of all aggravating and mitigating factors, as amply demonstrated by Florida's frequent reversals of jury overrides.

ARGUMENT

I.

NEITHER THE EIGHTH AMENDMENT NOR THE DUE PROCESS CLAUSE REQUIRES THE GIVING OF JURY INSTRUCTIONS ON LESSER INCLUDED OFFENSES WHERE SAID INSTRUCTIONS ARE NOT SUPPORTED BY THE FACTS, REQUIRED BY THE LAW OR DESIRED BY THE ACCUSED.

The Petitioner comes before this Honorable Court seeking a ruling to the effect that "due process" requires trial judges to blindly give lesser included offense instructions in all capital cases in all jurisdictions without regard to the evidence, the law of the jurisdiction, or the desires of the accused. The Respondent opposes such a rule.

Spaziano begins his argument with an allegation that this case is before the Court "in precisely the same factual and legal posture as was Beck v. Alabama, 447 U.S. 625 (1980)." This is incorrect.

Mr. Beck was charged with first degree premeditated murder. Although Alabama

defines certain offenses (such as felony murder) as lesser included offenses of the crime charged, an Alabama statute prevented the jury from being advised of this fact no matter the evidence. Mr. Beck was shown to be guilty of the lesser offense of felony murder.

Spaziano was also charged with premeditated first degree murder. The actual evidence linking Spaziano to the crime came from a witness named Dilisio. Mr. Dilisio told a tale of horrid savagery, supporting no lesser offense than the crime charged.

In equating his case to Beck, Spaziano attempts to overcome this threshhold problem by attacking the character and credibility of Mr. Dilisio's testimony in an effort to characterize it as proof of a lesser offense. It is suggested that Dilisio's testimony cannot be reweighed at this time. Tibbs v. Florida, 457 U.S. 31

(1982).

Mr. Spaziano also neglects to account for the fact that the statute of limitations is an essential element of the crime (a "jurisdictional fact") that must be proved. King v. State, 282 So.2d 162 (Fla. 1973). Absent proof of this fact, there is no proof of any lesser offense, and no verdict thereon is even possible. Perry v. State, 137 So. 798 (Fla. 1931); Holloway v. State, 362 So.2d 333 (Fla. 3d DCA 1978), cert. denied, 379 So.2d 953 (Fla. 1980), U.S. cert. denied, Holloway v. Florida, 449 U.S. 905 (1980). In this case, the statute had run as to all lesser included offenses. Thus, the evidence did not "support" any conviction on any lesser included offense.

Third, Spaziano offers to interpret for the Court the reasons why the jury took six hours to reach a verdict, the impact of the court's alleged "Allen"

charge, and the jury's motive in recommending the sentence it did. None of these theories have any basis in the record and thus fall as the imaginings of the Petitioner.

Finally, Mr. Spaziano--not the court --rejected the jury instructions.

A. Florida's Statute of Limitations and Its Impact Upon Jury Instructions

Statutes of limitations did not exist at common law. They are legislative creations manifesting a concession by a sovereign of its right to prosecute stale cases. There is no federal constitutional right to a limitation of action, and thus the states vary in their treatment of them.[1]

Florida generally holds that its statutes represent a jurisdictional bar that

[1] Statutes of Limitations are absolute bars to prosecution in some states but merely affirmative defenses in others, see e.g., State v. Latil, 92 So.2d 63 (La. 1956); State v. Rosen, 145 A.2d 158 (N.J. 1948).

is controlled by the defendant. Although it may be alleged at any time, Mitchell v. State, 25 So.2d 73 (Fla. 1946), it may be waived. Horton v. Mayo, 15 So.2d 327 (Fla. 1943); see Oliver v. State, 379 So.2d 143 (Fla. 3d DCA 1980).

As noted by Spaziano, one Florida case, Tucker v. State, 417 So.2d 1006, 1013 (Fla. 3d DCA 1982) has characterized the "right to waiver" as unresolved. That court, however, found nothing to indicate that waiver was undesirable or unconstitutional, stating:

> Whether a defendant may waive the statute of limitations for purposes of jury instructions and possible conviction of a lesser included offense is an issue separate from that of the legality of prosecution of an offense barred by the statute. Holloway v. Florida, 449 U.S. 905, 101 S.Ct. 281, 66 L.Ed.2d 137, supra. A defendant who believes a criminal statute of limitations no longer works to his advantage should be permitted to waive that statute."

The Petitioner contends that

"forcing" Spaziano to waive his limitations defense unfairly compels him to trade "one right for another." In response, the State submits that the mere existence of a trade does not in and of itself create a violation of due process. Indeed, many strategic "trades" take place regularly without offending the Constitution. For example, a defendant has an absolute right to trade (waive) even constitutional rights if he deems it to be to his advantage. See Johnson v. Zerbst, 304 U.S. 458 (1938). Spaziano's "trade" does not begin to rise to that level. Indeed, it is a common practice in Florida for felons to have their cases presented on an "all or nothing" basis, in hopes of obtaining an acquittal because the crime, as charged, was not proved or to intimidate the jury into an acquittal rather than impose a harsh sentence on the basis of weak evidence. Our record reflects that Spaziano employed

both arguments.

Mr. Spaziano represents that the trial judge was required to instruct the jury on all lesser degrees of homicide by Brown v. State, 206 So.2d 377 (Fla. 1968). This is not correct.

Brown was the Supreme Court of Florida's seminal case on lesser included offenses and jury instructions under former chapter 919 of the Florida Statutes. In discussing homicides, the court noted that certain offenses which were not "necessarily lesser included offenses" were, by law, declared to be lesser offenses of first degree murder.

The court stated that these lesser offenses must be given to the jury if requested, but otherwise "should" be given. This was notwithstanding the legislature's use of the word "shall" in the controlling statute. §919.14, Fla. Stat. (1965).

The court made another observation not mentioned by Spaziano; namely that no appeal would be allowed from any failure to give lesser offense instructions in the absence of a proper record request, pursuant to section 918.10, Florida Statutes.

Effective January 1, 1968, the Florida Rules of Criminal Procedure took effect. The provisions of former section 919.14, Florida Statutes were carried over in Florida Rule of Criminal Procedure 3.490, while the duty to preserve appellate remedies by making a record request for the instructions carried over in 1970 when Florida Rule of Criminal Procedure 3.390(d) took effect.

Thus, when Spaziano came to justice in January of 1976, he had the right to waive any limitations defense and a duty to make a record request for jury instructions on any lesser offenses. Having not only failed, but actually refused, any

lesser instructions, Spaziano could not appeal the "court's failure" to give them. Indeed, he did not. Spaziano sent a copy of the Beck opinion to the Supreme Court of Florida without argument, as "supplemental authority."

Beck was disposed of as factually inapplicable because Spaziano's lesser offenses could not be proven. The Petitioner's Brown and statute of limitations arguments were not addressed. It is suggested that Spaziano cannot obtain de novo federal review. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977); Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037 (1976); Anderson v. Kerless, ___U.S.___, 103 S.Ct. 276 (1982).

Florida's treatment of its statutory defense of limitations, and its Supreme Court's interpretation of its rules, do not present federal or constitutional issues, even if this Court would have arrived at a different result. Gryger v. Burke, 331 U.S.

728, 68 S.Ct. 1256 (1948).

This brings us to Holloway v. State, 362 So.2d 333 (Fla. 3d DCA 1978), cert. denied, 379 So.2d 953 (Fla.), U.S. cert. denied, Holloway v. Florida, 449 U.S. 905 (1980). Holloway states that defendants are not entitled to jury instructions on lesser offenses for which the statute of limitations has run because those lesser offenses cannot be supported by evidence. See Perry v. State, 137 So. 798 (Fla. 1931).

Another Florida court reached the same conclusion in Keenan v. State, 379 So.2d 147 (Fla. 4th DCA 1980) and, of course, the issue was addressed in Tucker v. State, 417 So.2d 1006 (Fla. 3d DCA 1982).

In denying certiorari in Holloway the Florida Supreme Court implicitly rejected any Brown-based claim that lesser offense instructions are required where the statute of limitations had expired.

Clearly, Florida courts have

resolved this issue of state law against the Petitioner.

B. "Due Process" Considerations

"Due process" is often tritely misused as a synonym for "the petitioner did not care for the result." Constitutional due process means only that "the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained." Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505 (1934).

It is submitted that Florida's treatment of lesser offense instructions in cases where the statute of limitations has run is neither unreasonable, arbitrary, nor capricious.

Here, again, we distinguish Beck because no limitations problem existed there and, as a result, evidence existed proving the lesser offense. Since Florida

equates limitations with an element of the crime, it is impossible to have sufficient evidence to prove a lesser offense if the statute has run.

In denying certiorari in Holloway, thus implicitly rejecting a Brown-based claim[2], the Florida Supreme Court (and its District Courts of Appeal, in their turn) has treated this situation in the same manner as the federal courts. That is, absent an evidentiary base, the lesser offense instruction is not required. Keeble v. United States, 412 U.S. 205, 93 S.Ct. 1993 (1973); Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382 (1980); see United States v. Whitaker, 447 F.2d 314 (D.C. Cir. 1971), F. R. A. P. 31(c).

The federal standard was summarized neatly in United States v. Thompson, 492

[2]Brown, like Beck, never confronted this issue.

F.2d 359 (8th Cir. 1974), where the requisites of a lesser offense instruction included a proper request for the instruction and a basis in the evidence.

Florida's standard affords as much protection, if not more. In addition, Florida places in the hands of the defendant the power to compel instructions on lesser offenses despite a "lack of proof" by waiving a limitations defense.[3] Since the option rests with the defendant and not the state, and since no constitutional rights are involved, "due process" is not violated.

Spaziano complains that his jury was out for six hours and eventually recommended a life sentence, causing him to speculate that a "deal" was made regarding his fate, and that the jury possibly would

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[3]This compares to the federal requirement of "mutuality" as a prerequisite for a lesser offense instruction. (i.e., the instruction must be available to both sides.)

have shown mercy upon him and only convicted him of a lesser offense. Lesser offense instructions do not exist to provoke "mercy" verdicts. Kelly v. United States, 370 F.2d 227 (D.C. Cir. 1966), cert. denied, 388 U.S. 193 (1967); United States v. Sinclair, 444 F.2d 888 (D.C. Cir. 1971).

C. Final Considerations

The Honorable Justices Marshall and Brennan, in their dissent in Spaziano v. Florida, 454 U.S. 1037 (1981), stated that a defendant should not be penalized because the state failed to bring him to trial within the limitations period. It is respectfully suggested that this approach is analgous to the "don't let a good boy go bad, lock your car" philosophy of the 1960's. When someone like Spaziano hacks up a body, conceals it in a dump and evades arrest for two years, is it the state that has penalized him--or Spaziano who has penalized himself. Just because one has a

"presumption of innocence" does that create a "right" to flee? If so, why are "flight to avoid prosecution" and "escape" crimes?

True, by hiding out Spaziano "lost" a line of defense, but by no stretch of the imagination was he unfairly penalized by the state of Florida.

Spaziano's brief neglects to state what instructions are to be given in cases such as his.

The Respondent asks, is the trial court expected to hoodwink the jury by misstating that Spaziano "could" be convicted of a lesser offense when in truth he could not? Or, on the other hand, is the trial court to advise the jury of the lesser offenses and tell them, because the statute of limitations has run, that a conviction is not possible?

To be sure, Spaziano would have us lie to the jury. Under his theory, the jury would not be advised of the juris-

dictional fact--so they would not look for it. Then, he could prevail if the jury felt (compromised) it should give him the benefit of the doubt in a close case or if it exercised the phenomenon known as the "jury pardon."

Can we imagine the outrage and disrespect for our already beleagured judicial system if juries were told they "could" convict on a lesser offense and then, upon doing so, suffered a "gotcha" surprise as the man they convicted was set free?

Florida considers it improper to hoodwink or deliberately mislead juries, Perry v. State, 137 So. 798 (Fla. 1931), and it is suggested that the conduct is ethically proscribed as well. We cannot engender any respect for our judicial system by instutionalizing chicanery.

That brings us to the next option, fully informing the jury that there are

lesser offenses for which the statute of limitations has run, so that a verdict of guilt on a lesser offense will result in the defendant's release.

If Spaziano is afraid that an "all or nothing" presentation will prompt a jury to return a guilty verdict rather than free him, those same fears would materialize under this second approach.

So, do we lie to the jury and surprise them by setting the defendant free, or do we fully inform them so that (essentially) the choice remains "all or nothing." One result is distasteful, deceitful and unethical, the other is a meaningless exercise, therefore, no reason exists to compel the giving of instructions not supported by the evidence.

The bottom line is that Spaziano's complaint can only be validated by ignoring Florida's interpretations of its procedural laws--substituting federal inter-

pretations, then reweighing the courtroom evidence on appeal, then ignoring his procedural default (by not requesting the instructions) and finally institutionalizing deceptive practices. There simply is no legal, factual, or public policy merit to Spaziano's complaint.

II.

THE STATE OF FLORIDA PROPERLY VESTS FINAL SENTENCING AUTHORITY IN ITS TRIAL JUDGES SUBJECT TO REVIEW IN THE STATE SUPREME COURT.

This argument addresses Spaziano's arguments regarding Florida's capital sentencing procedures.

It is respectfully submitted that Spaziano's complaint is vague and his solution to the problem totally undiscernible.

Spaziano asserts that jury overrides are improper because "societal trends" dictate vesting juries with final author-

ity, because juries reflect societal values in their decisions while judges do not, because scholars (unidentified) feel juries should impose sentence and because most states let the juries impose sentence. After all of this, however, Spaziano states that these ostensibly controlling factors only apply when the defendant is sentenced to death after an override.

By extrapolation, none of Spaziano's meritless social theories or incorrect legal statements dictate that jury recommendations should be binding if the recommendation is death.

How is Florida to implement such a system? Is the State to simply have an ad hoc rule that every life recommendation by a jury is valid but every death recommendation is invalid? Shall every override in favor of death be void, but every life override be valid?

The Respondent is unaware of any

legal authority, and Petitioner presents none, supporting the proposition that the constitutionality of any criminal procedure depends on the result obtained. The closest analogy the Respondent can draw would be a system (under the Spaziano-result-based theory) whereby Fourth Amendment claims would be evaluated on the basis of "what" was found, or Fifth Amendment violations assessed on the basis of "what was said." Spaziano's legal theorum is totally meritless.

It is suggested that the constitutional analysis must focus upon the procedure under review, not the outcome of a particular case.

Spaziano states that, per Gregg v. Georgia, 428 U.S. 153 (1976), Florida's override procedure should be examined through a two-step analysis of contemporary societal values (trends) and threshhold constitutionality. Spaziano properly

concedes the threshhold issue, per Proffitt v. Florida, 428 U.S. 242 (1976) and Dobbert v. Florida, 432 U.S. 282 (1977). Proffitt in particular holds (in Mr. Justice Powell's concurrence) that "jury sentencing" is not required by the constitution.

This brings us to the question of societal trends, dwelt upon at length by Spaziano and the amicus curiae.

Since the defendant at bar finds it to his personal advantage to "prefer" a binding jury recommendation as opposed to an advisory one, and since he perceives a social trend in that direction, he asks this Court to revamp Florida's procedures to suit his needs.

In McGautha v. California, 402 U.S. 183, 195-6 (1971), this Honorable Court said:

> Before proceeding to a consideration of the issues before us, it is important to recognize and underscore the nature of our responsibilities in judging them. Our function is not to impose

> upon the states, ex cathedra, what might seem to us a better system for dealing with capital cases. Rather, it is to decide whether the Federal Constitution proscribes the present procedures.

In Swisher v. Brady, 438 U.S. 204 (1978) this Court reaffirmed that the "fact-finder" and the "adjudicator" are entities designated and empowered by the state.

Despite these considerations, Spaziano and the amici curiae suggest that historic trends toward trials by jury dictate sentencing by jury.

Actually, if any societal trend or contemporary value is relevant to this inquiry, it is society's quest for a reliable, guided, consistent and unbiased sentencing procedure in the post-Furman[4] era. In modern times, the trend has been away from "unbridled jury discretion" (a phase that calls into question Spaziano's claims that

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[4] Furman v. Georgia, 408 U.S. 238 (1972).

juries are better suited to impose sentence than judges) and towards a guided system of checks, guidelines and cross-checks.

In Florida, a sentencing hearing takes place in the presence of the judge and jury. The jury renders a layman's opinion on sentencing, then the judge imposes sentence. Overrides occur "both ways" at this stage. After sentencing, mandatory review of any death sentence is conducted by the Florida Supreme Court.

One cannot realistically read Proffitt, Dobbert, Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418 (1983); or Furman itself and detect any trend towards mandatory jury sentencing. Indeed, Lockett v. Ohio, 438 U.S. 586, 609 n. 16 (1978) and Proffitt call into question the need for any jury participation at all.

Thus, utilizing Spaziano's own two-part test, we find neither a social-theory, nor a constitutional defect argument

against Florida's override procedure. Again, however, the Respondent notes that this appeal does not question the override procedure. Rather, Petitioner requests a new ad hoc procedure under which life recommendations are per se proper and binding, while death recommendations are not.

Failing to justify the result-bias social theory, Mr. Spaziano addresses the applicability to this cause of Bullington v. Missouri, 451 U.S. 430 (1981).

Bullington was tried and convicted of capital murder. Then, pursuant to Missouri law, a separate sentencing trial took place pursuant to which a binding jury verdict of life was rendered. Bullington won a new trial on the guilt issue and was convicted anew.

This Court found the existence of what is best called two trials, one on guilt, one on the proper sentence. Distinct findings of fact had to be made by the trier

of fact at every stage. At every stage, the trier of fact was the jury. Sentence was imposed by the jury.

Florida's procedure is not like Missouri's. Florida, as is its right, has designated the trial judge to be the finder of fact. It is the judge, not the jury, who reports what aggravating and mitigating factors have been proved. It is the judge, not the jury, who sees the presentence investigation if he (the judge) chooses to order one. The trial jury is allowed to add its opinion to the judge's sentencing decision, and as a matter of grace that opinion is afforded great weight. The sentence, however, is determined by the judge.

Apparently Spaziano urges a construction of Bullington to the effect that the presence of the jurors in the courtroom at sentencing requires mandatory, binding jury sentencing even if the jury, under the law of the jurisdiction, was only

present in an advisory capacity.

Bullington does not say that. Bullington, drawing upon Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141 (1978) merely states that once the designated trier of fact in an adversary proceeding determines the merits of a claim, the issue cannot be retried absent a reversal on some ground other than insufficiency of the evidence to support the verdict. Thus, because Bullington had a sentencing trial, which itself was not reversed, he could not be forced to "run the gauntlet" anew.

This really does not affect Florida's procedure. Our designated fact-finder and adjudicator during sentencing hearings is the judge. If a judge sentences a capital felon to a life sentence, Bullington would merely require that, upon any retrial, and subject to North Carolina v. Pearce, 395 U.S. 711 (1969), the judge could not force a retrial on the sentencing issue.

Thus, Bullington is not concerned with who the fact finder is, but just how many times the defendant has to persuade him. See United States v. DiFrancesco, 449 U.S. 117 (1980).

III.

FLORIDA'S JURY OVERRIDE PROCEDURE IS CONSTITUTIONAL AS WRITTEN AND APPLIED.

Spaziano's third argument is not so much a complaint regarding Florida's jury override procedure as it is an attack on the outcome of this particular case.

Spaziano's first argument is that because Tedder v. State, 322 So.2d 908 (Fla. 1975) uses language to the effect that the "facts suggesting death" must be clear and convincing, no analysis is made of facts suggesting anything else. This argument distorts grossly the meaning of Tedder.

Any analysis of any case where death

is imposed must, in deciding whether the facts suggest a sentence of death, by its very nature incorporate a review of the mitigating evidence. Indeed, given the excellent record of the Supreme Court of Florida in reversing jury overrides, this argument is best characterized as specious.[5] See also, Proffitt v. Florida, 428 U.S. 242, 253 (1976) (re: general reversals of death sentences).

Aside from twisting some selected phrases out of context, Spaziano has cited no legal authority for his claim that Florida does not permit reviewing courts to weigh mitigating evidence.

Spaziano asserts that the Tedder standard cannot be satisfied because in virtually every override case reasonable people somewhere have differed regarding the appropariate sentences, citing Spinkellink v.

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[5]As noted by Spaziano, out of 83 overrides only 20 have been affirmed.

Wainwright, 578 F.2d 582 (5th Cir. 1978). Particularly singled out are the jurors and the trial judge on one side, and the dissenting Florida Supreme Court justice on the other.

The Tedder court did not intend, in creating a harsh standard, to create an unattainable standard. In stating that "virtually no reasonable person could differ," the court, (which assuredly was aware of the jury recommendation and its own dissenting brethren) spoke in qualitative, not quantitative terms. Indeed, reasonable people may have unpersuasive, incorrect or unreasonable reasons for their conduct on any given occasion. Perhaps, for example, the jury acted unreasonably in resolving a case with a quotient verdict, or improperly injected itself into the sentencing phase of a case, choosing to grant a "jury pardon" or compromising in some other manner. Were the jurors

reasonable? Perhaps, but their conduct was not.

Likewise, appellate judges reviewing cold transcripts may yield to the temptation to reweigh evidence, despite Tibbs. When the search for legal sufficiency is thus tainted, the reasonableness of the result may suffer without regard to the reasonableness of the man.

Again, it must be remembered that Spinkellink's conviction and sentence was affirmed, and he was executed, notwithstanding the dicta relied upon by Spaziano.

This brings us almost full circle to the crux of Spaziano's case. He does not want the Court to abandon its prior decisions, nor does he suggest that any Florida procedure is itself violative of the constitution. What Spaziano wants is special treatment for himself. Since he was sentenced to death, he wants a trial de novo in this Court. He closes his

brief the way he began it, attacking the weight and credibility of the testimony that convicted him.

The final assertion of Spaziano, that the trial judge improperly considered his rape/mutilation of a lady in Orlando, is again a distortion, and was not raised in his petition for certiorari.

The representation is also in error. The transcript of the resentencing (RS 222) shows that the court considered Spaziano's Orlando crime even though the advisory jury did not. (That crime was incorrectly kept from the advisory panel.) Therefore, nothing "new" was presented in resentencing.

Since resentencing occurred at Spaziano's insistence, he is hard pressed to complain about it in any event.

Finally, Spaziano comes before the court on the basis of a death sentence imposed following a non-jury proceeding. No jury attended, no jury advised the

court, no jury suggested a sentence. The sole trier of fact in the room was the judge. Thus, no jury override took place in imposing the sentence at bar, and no claim exists.

CONCLUSION

Having seen Spaziano's brief, we see that he has obtained review on the premise of presenting constitutional issues relating to this Court's decisions in Beck and Bullington. Now that he is "in the door," however, he conceds the propriety and constitutionality of Florida law, but requests special dispensation and ad hoc rule-making for the exclusive benefit of his case. In doing so he requests reinterpretation of state law, ad hoc rule-making, reweighing of evidence, and relief from his own strategic choices.

Relief should be denied.

Respectfully submitted this ___day of March, 1984.

JIM SMITH
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